

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
) GN Docket No. 09-51
A National Broadband Plan for Our Future)

REPLY OF AD HOC TELECOM MANUFACTURER COALITION

Our companies - which make voice, data, and video equipment, components, and software - submit this Reply to discuss four important points in response to the opening Comments of parties who have proposed that the FCC adopt network neutrality or special access price regulation, as follows:

- Contrary to the claim of Media Access Project (“MAP”), the Supreme Court has made clear, in the very decisions MAP cites, that the First Amendment does *not* require the adoption of network neutrality regulations.
- In fact, any network neutrality rules would be invalidated on appeal as inconsistent with the public interest unless the FCC documented when promulgating the rules that their benefits would outweigh their risks, including the risk that such rules would seriously reduce broadband investment.
- Likewise, the FCC could not lawfully adopt rules regulating special access prices without documenting that the benefits of such regulation outweigh the risks, including the risk that price regulation would seriously reduce broadband investment.
- We doubt that the FCC could lawfully adopt either network neutrality requirements or special access price regulation under the public interest balancing test since there is substantial evidence that either type of regulation would discourage broadband investment, thereby slowing deployment of broadband services and harming not only consumers but also the high tech manufacturing industry of which our companies are a part. For obvious reasons, the harm that would result from regulations that discourage investment would be especially great if such regulations were adopted during the present severe economic recession.

DISCUSSION

Although MAP claims that Supreme Court decisions in Associated Press, Red Lion, Turner, and NCCB¹ make clear that the First Amendment requires the government to adopt network neutrality regulations in order to promote diversity of information,² in fact the Supreme Court has never held that the First Amendment *requires* government regulation of private parties. Rather than constituting a grant of authority to regulate private parties, the First amendment instead is a *restriction* on the government's power to regulate, and in each case cited by MAP, the Court held only that the specific government regulation at issue did not violate the First Amendment restriction on government regulatory power. In Associated Press and NCCB, for example, the Court ruled that the regulation at issue there (antitrust in Associated Press and media ownership in NCCB) did not violate the First Amendment rights of newspapers. Likewise, in Red Lion, the Court held that the challenged content regulation did not violate the First Amendment rights of broadcasters. And in Turner, the Court ruled that the local TV station carriage regulation under attack there did not violate the First Amendment rights of cable TV companies.

Rather than make clear that the First Amendment *requires* the government to apply network neutrality regulation to communications broadband network owners, as MAP asserts, the Supreme Court decisions cited by MAP instead make plain that any decision to adopt such rules would violate the First Amendment rights of the broadband networks to whom they applied unless the government successfully documented, at the very least, both that the chosen rules

¹ *Associated Press v. U.S.*, 326 U.S. 1 (1945); *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969); *Turner Broadcasting v. FCC*, 512 U.S. 622 (1994); and *FCC v. NCCB*, 436 U.S. 775 (1994).

² MAP Comments at 1-4.

furthered an important government interest and restricted the First Amendment rights of broadband network owners no more than essential to further that interest.³

Even if network neutrality regulations were found *not* to violate the First amendment rights of broadband network owners, we believe such regulations *still* would be unlawful given the well established principle of administrative law that a regulation is unlawful as violating the “public interest” unless the government proves that the regulation’s benefits outweigh its risks, including the substantial risk in the case of network neutrality rules that network investment would be harmed.⁴ FCC Chairman Genachowski has affirmed that the cost/benefit analysis which must accompany adoption of any regulations in the present proceeding “will be data-driven” and will “supersede ideology,”⁵ and the full Commission has found that network investment would likely decline under various types of regulations that restrict conduct of network owners in a manner similar to what network neutrality regulation would do.⁶ Even more

³ *Turner Broadcasting v. FCC*, *supra*, 512 U.S. at 662 (quoting from *U.S. v. O’Brien*, 391, U.S. 367, 377 (1968)). The government would bear an even higher burden of proof in the event its chosen network neutrality regulations were deemed by the courts to be “content-based.” In that case, the regulations would violate the First amendment rights of broadband network owners unless the government documented that they were necessary to meet a “compelling government interest.” and were “narrowly tailored” to meet that compelling interest. *See, e.g., Miami Herald Publishing Co., v. Tornillo*, 418 U.S. 241 (1971).

⁴ *See, e.g.,* Sec. 706(a) of Telecom Act of 1996, reproduced under the notes to 47 U.S.C. § 157 (requiring FCC to “remove barriers to infrastructure investment”). *See also U.S. Telecom Ass’n v. FCC*, 359 F. 3d 554, 580 (D.C. Cir. 2004) (holding that the FCC’s duty to adopt regulations that serve “the public interest” made it lawful notwithstanding the resulting economic injury to ILEC competitors not to require UNE unbundling if mandatory unbundling “would impose excessive impediments to infrastructure investment”); *Puerto Rico Telephone Authority/GTE Merger*, 14 FCC Rcd. 3122 at ¶ 58 (1999) (finding that the merger at issue in that case was in the public interest in part because it was likely to result in additional infrastructure investment); American Recovery and Reinvestment Act of 2009 at § 6001(k)(2)(D), 123 Stat. 115 (2009) (directing FCC to adopt a plan that increases private sector investment in broadband infrastructure).

⁵ Chairman Julius Genachowski, Prepared Remarks on National Broadband Plan Process, July 2, 2009 FCC Open Meeting.

⁶ *See, e.g., Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd. 14853 ¶ 44 (requiring a broadband wireline ISP to sell transmission to other service providers would “diminish . . . [its] incentive and ability to invest in and deploy broadband infrastructure”); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling*, 17 FCC Rcd 4798 at ¶ 5 (2002) (requiring a cable TV ISP to sell cable transmission to other ISPs would harm investment and innovation);

significant is the fact that a substantial body of research shows that network neutrality regulations themselves likely would have a seriously negative impact on network investment.⁷ And though some proponents of network neutrality regulation speculated in their opening Comments that such rules might not harm network investment,⁸ none offered evidence supporting that speculation, and none explained why numerous research studies should be ignored showing that net neutrality regulation is likely to cause decreased investment.

Just as well established principles of administrative law would make it unlawful for the Commission to adopt network neutrality rules unless the agency showed that the benefits

Computer III Phase I Order, 104 FCC 2d 958, 964 (1986) (finding that requiring local telephone companies to provide enhanced services through a subsidiary reduced network and service innovation); *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Order on Remand*, 18 FCC Rcd. 16978 at ¶¶ 176-78, 272-95 (2003) (requiring local phone companies to provide fiber loops to competitors as an unbundled network element would slow infrastructure investment and network innovation); *Qwest Pet. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, 23 FCC Rcd. 12260 at ¶ 58 (2008) (eliminating Computer Inquiry requirements on existing packet-switched broadband services and optical transmission services will increase incentives to invest in advanced network technologies).

⁷ See, e.g., T. B. Lee, “The Durable Internet: Preserving Network Neutrality Without Regulation”, CATO Institute Policy Analysis, No. 626 (Nov. 12, 2008); J. A. Eisenach, “Broadband Policy: Does the U.S. Have It Right After All?”, The Progress & Freedom Foundation, Rel. 15.14 (Sept. 2008); G. Ford *et al.*, “The Welfare Impacts of Broadband Network Management: Can Broadband Service Providers be Trusted,” Phoenix Center (Mar. 2008); D.L. Weisman, “On Market Power and the Power of Markets: A Schumpeterian View of dynamic Industries”, The Free State Foundation, Perspectives from FSF Scholars Vol. 3, No. 5 (Feb. 26, 2008); R. E. Litan, *et al.*, “Unintended Consequences of Net Neutrality Regulation”, Journal on Telecom. & High Technology Law (2007); Staff of Federal Trade Commission, “Broadband Connectivity Competition Policy” (June 2007); “R. W. Hahn *et al.*, “The Economics of ‘Wireless Net Neutrality’”, AEI-Brookings Joint Center for Regulatory Studies, (Ap. 2007); T. R. Beard *et al.*, “Network Neutrality and Industry Structure”, Hastings Comm./Ent. L.J. 149 (2007); G. S. Ford *et al.*, “Wireless Net Neutrality: From Carterfone to Cable Boxes”, Phoenix Center, Policy Bulletin No. 17 (Ap. 2007); G. S. Ford *et al.*, “The Burden of Network Neutrality Mandates on Rural Broadband Deployment”, Phoenix Center, Policy Paper No. 25 (July 2006); L. F. Darby, “Consumer Welfare, Capital Formation and Net Neutrality” at 7-8, 31 (rel. by American Consumer Institute, June 6, 2006); J.G. Sidak, “A Consumer Welfare Approach to Network Neutrality Regulations of the Internet,” Journal of Comp. Law & Economics, Oxford Press, Vol. 2 No. 3 (2006); IDC, “U.S. Consumer Internet Traffic 2007-2011 Forecast: The Impact of Net Neutrality Regulation on Service Provider Infrastructure Investment” at 7 (June 2007), avail. at www.theinfoSHOP.com/study/id53339-internet-traffic.html; S. Pociask, “Net Neutrality and the Effects on Consumers,” The Am. Consumer Institute (May 9, 2009). See also 3A Areeda & Hovenkamp, Antitrust Law ¶ 773b2 at 203-04, ¶ 773b3 at 206-07, and ¶ 774c at ¶ 220-21 (1996); Comments of the Section of Antitrust Law of the American Bar Ass’n In Response to the Fed. Trade Commission’s Request for Public Comment Regarding Broadband Connectivity Competition Policy at 6 (Mar. 2007) (Network neutrality regulation “could distort . . . investment incentives by increasing the risk that the investments, once sunk, will be prohibited from profit-maximizing and useful purposes”).

⁸ See, e.g., Free Press Comments at 145-46.

outweigh risks, including the risk that network investment would be hurt, those same principles would bar the agency from reversing its nine-year-old policy of giving price cap-regulated phone companies flexibility to set special access service prices without considering the negative impact on network investment that could result from that policy change. While some assert in their opening Comments that regulating the price of special access would benefit the public interest since phone companies have market power in the provision of special access service,⁹ a claim that is disputed by others,¹⁰ even the existence of market power would not validate reinstatement of price regulation unless the resulting risks, including reduced network investment, were shown to be less severe than the benefits of price regulation.

⁹ BT Americas Comments at 4-8; XO Communications Comments at 22-27; Free Press Comments at 120-127; Public Knowledge *et al.* Comments at 27-29; Sprint Comments at 8-21; Nat. Telephone Cooperative Ass'n Comments at 36-39; T-Mobile Comments at 18-19; Cbeyond *et al.* Comments at 5-7, 16-17.

¹⁰ *See, e.g.*, AT&T letters dated June 22 at 2-4 and Feb. 6, 2009 at 5-7 (Dkt. No. 05-25); Letter from 19 telecom manufacturers dated April 3, 2009 (Dkt. No. 05-25).

CONCLUSION

Network neutrality regulations could be adopted and special access price regulation could be reinstated *only* in the unlikely event that the FCC were able to prove, based on the record, that the benefits exceed the risks, including the serious risk that such regulations would reduce broadband investment.

Respectfully submitted,

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